IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT: 12/12

In the matter between:

THE OCCUPIERS OF SARATOGA AVENUE Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

BLUE MOONLIGHT PROPERTIES 39 (PTY) LIMITED Second Respondent

ANSWERING AFFIDAVIT

I, the undersigned

PIETER MACHIEL DE KLERK

do hereby make oath and say:

1. I am the First Respondent's Deputy Director: Legal and Compliance and I am duly authorised to oppose this application and make this Affidavit.

2. The facts deposed to by me herein are, save where otherwise stated or where the context indicates otherwise, within my personal knowledge and are to the best of my knowledge and belief true and correct.

3. I have read the Founding Affidavit of **KATHLEEN HARDY** and wish to answer thereto as follows:

4. Before I answer to the Applicant's Founding Affidavit, I must point out the following.

4.1 The order of this Honourable Court of the 1st December 2011 has at least two distinct consequences. Firstly, the City of Johannesburg ("the City") must provide the occupiers of Saratoga Avenue listed on the survey of the 30th April 2008 ("the survey") with temporary accommodation on or before the 1st April 2012. Secondly, the City must devise a mechanism to deal with applications for temporary accommodation by the numerous other people facing eviction in Johannesburg;

4.2 The first of these obligations is, theoretically at least, much easier to fulfil than the second. Public sector bureaucracies are often criticised for the slow pace at which they move. The policy development and decision making process is relatively slow and cumbersome because the implications of decisions of entities like the City may have such broad ranging implications. What appears to others to be inordinately long, allows proper consideration of a matter by the many and varied stakeholders that participate in a decision making process.

5. Since early December 2011, the First Respondent has been working towards specific compliance with its obligation to house those on the survey who are still resident on the property and of course to devise the mechanism referred to above with respect to others facing eviction. Compliance has necessitated a redirection of resources and extensive negotiations around competing priorities. Notwithstanding this however the First Respondent has identified accommodation to enable it to comply with the Court Order. I will provide the detail of this accommodation below.

6. Some statistics may be useful at this point:

6.1 The survey of 30 April 2008 records 86 individuals. Of these, 53 were men, 28 were woman and 5 were children;

6.2 There are now 100 people resident at the property, none of whom are children, 64 of these have gone through a registration process;

6.3 27 of those registered appear on the survey;

6.4 If Annexure “H” to the Founding Affidavit herein is correct, there is a total of 45 people listed on the survey who remain in occupation at the property;

6.5 The 55 individuals in occupation of the property and not listed on the survey allege that they are entitled to be accommodated through the following relationship with a person on the survey:

6.5.1 9 are listed as partners;

6.5.2 6 are listed as adult sons and daughters;

6.5.3 12 are listed as cousins;

6.5.4 8 are listed adult nephews or nieces;

6.5.5 15 are listed as brothers or sisters;

6.5.6 no family relationship is listed in respect of 9 individuals under the heading “TBC”;

6.5.7 the discrepancy in numbers is explained by 4 individuals being listed as non-residents while their link relationships are indicated.

7. The First Respondent contends that the Honourable Court’s use of the survey was deliberate and appropriate, as was the exclusion of any persons occupying through the members of that list. The impact on the First Respondent and other local authorities of the obligation to provide temporary accommodation is massive, and country-wide probably

numbers hundreds of thousands of people. The City has argued throughout these proceedings the danger of having to “chase a moving target” and the Honourable Court has, with respectfully correctly, taken cognisance of this danger.

8. It is not simply a case of arguing that the survey comprised 86 people and that it is an easy step from that number to accommodate 100. It is not a question of numbers: it is the First Respondent’s ability to plan in accordance with a constitutionally acceptable policy.

9. The breakdown of the extra 55 individuals bears some scrutiny. There can be no doubt that the First Respondent would without question provide accommodation for any minor children in residence of those on the survey. Of those Applicants who now claim a right to accommodation through those on the survey, there exists something of a hierarchy of relationship. While the First Respondent is obviously sensitive to differing cultural norms, there can be no doubt that a life partner is a much closer relationship to an individual than a cousin. Even if the Honourable Court was of a mind to incorporate certain of the Applicants into its order, it will

be argued on behalf of the First Respondent that this hierarchy of relationship should be considered.

10. The temporary accommodation to be offered to those who have registered and who are named on the survey are as follows:

10.1 Single individuals, earning R700.00 per month or more, will be accommodated in the Linatex Building in dormitory style accommodation sharing communal facilities. The rental for this accommodation is R350.00 per bed per month;

10.2 Family units (mother, father and minor children) will be accommodated in the MBV Building Phase 2 at a rental of R600.00 per month per room. Two individuals each with minor children may elect to share this accommodation but each adult will be obliged to pay rental of R600.00 per month per room;

10.3 Those who have no income whatsoever or an income less than R700.00 per month will be accommodated in an Inner City shelter;

11. **AD PARAGRAPHS 1 AND 3**

The contents of these paragraphs are admitted.

12. **AD PARAGRAPHS 4 TO 7**

The contents of these paragraphs are admitted.

13. **AD PARAGRAPH 8**

13.1 While is correct that the process undertaken by the First Respondent has been slower than the Applicants would have liked, it has been working unremittingly to ensure that it is in a position to comply with the order of this Honourable Court. The First Respondent is only now in a position to advise the Applicants and their legal representatives of its intentions with respect to complying with the order and the mechanism thereof. The real purpose of this application is to incorporate others onto the list of those the First Respondent is obliged to temporarily accommodate notwithstanding the deliberate terms of the order of this Honourable Court;

13.2 The First Respondent contends that this application was not necessary with respect to prayers 2.1, 2.2 and 3 of the Notice of Motion and that the real purpose of the application is contained in paragraph 2.3 of the Notice of Motion, to which relief the Applicants are not entitled.

14. **AD PARAGRAPH 10**

14.1 Most of this paragraph is correct, subject to the comments above regarding the proximity of family relationships. The First Respondent contends that the wording employed by the Honourable Court in the Court Order is, respectfully, quite deliberate in that no persons occupying through those persons whose names appear in the survey are entitled to temporary accommodation in terms of the order;

14.2 The accommodation to be provided by the First Respondent is temporary accommodation. To the extent possible, the First Respondent will attempt to accommodate nuclear family units i.e. mother, father and child as such. It is however not always possible

to accommodate adult siblings, cousins or children in family accommodation.

15. **AD PARAGRAPH 11**

As I have indicated above, the detail of the temporary accommodation is only now available. In the circumstances, the City has not been able to provide the Applicants (or their legal representatives) with the assurances that they require. Indeed even now, the Applicants probably require assurances that the First Respondent cannot give with respect to, for example, family accommodation. The Applicants assume correctly that the purpose of the registration process was with respect to compliance with the order of this Honourable Court. It would be incorrect however to assume that registration of those not on the survey meant that they would be incorporated into the Court Order.

16. **AD PARAGRAPH 12**

It appears that the parties were at cross-purposes. While the registration process was directly linked to compliance with the order of this

Honourable Court, Elsie Naidoo (“Naidoo”) was attempting to convey that mere registration would not translate as incorporation of the Applicants into the orders. The Confirmatory Affidavit of Naidoo is annexed hereto as **“PMDK-1”**.

17. **AD PARAGRAPH 13**

While it is correct that the First Respondent was not able to come on record with any of its plans until now, the deponent and her predecessor, Morgan Courtenay (“Courenay”), have indeed been in regular telephonic contact with the First Respondent’s legal representatives since at least the middle of January 2012.

18. **AD PARAGRAPH 14**

The First Respondent is able to comply with the order of this Honourable Court.

19. **AD PARAGRAPH 15**

It was wrong of the Applicants to assume that the First Respondent would not comply with an order of this Honourable Court. If the First Respondent was not able to comply, it would have itself approached this Honourable Court and brought an application if necessary.

20. **AD PARAGRAPH 16**

I deny that the City's conduct is either unreasonable or unlawful. I have explained above the re-ordering of priorities that has had to take place in order to comply with the order as well as the policy development that is currently underway. With respect to the temporary accommodation, the First Respondent could not engage with those to be accommodated until it knew what accommodation was available to it.

21. **AD PARAGRAPH 17**

As indicated above, it is the First Respondent's view that this application is premature and is indeed no longer necessary.

22. **AD "IF IT IS TO ENGAGE THE CITY"**

The First Respondent does not deny the Applicants' legal advisers' attempts to obtain information from the City: the information was simply not available until now. The First Respondent was simply not able to respond at the pace the Applicants' legal advisers require. This application must however be seen for what it really is: an attempt to incorporate into the order those who occupied the property more recently than April 2008.

23. **AD PARAGRAPH 29.1**

This allegation is vague: these people are not identified and no explanation is given for why they were not recorded. I am accordingly unable to deal with it

24. **AD PARAGRAPH 29.2**

Although "partners" are recorded on Annexure "H" to the Founding Affidavit, it is not indicated which people have got married or entered into life partnerships. This information is relevant herein and should have been

detailed in the Founding Affidavit. There are no children reflected on Annexure “H”. The First Respondent’s housing authorities indicate that 4 minors have been registered although they are clearly not children. Those that have been joined at the property by members of their family presents a substantially more contentious issue in the light of the hierarchy of family relationships referred to above.

25. **AD PARAGRAPH 30**

I have dealt with the contents of this paragraph and the implications thereof above.

26. **AD PARAGRAPH 31**

An undertaking to consider the registration does not amount to an undertaking to accommodate people in accordance with the order of this Honourable Court herein.

27. **AD PARAGRAPH 32**

The conclusions drawn by the deponent cannot be supported by the facts of the matter.

28. **AD PARAGRAPH 34**

An inevitable consequence of the order of this Honourable Court is that the City would have to register those resident on site in order to establish which of those still resident were entitled to temporary accommodation. The Honourable Court did not order that those occupying through those on the list are entitled to temporary accommodation and the City did not plan accordingly.

29. **AD PARAGRAPH 35**

The contents of this paragraph are admitted and correctly reflect the First Respondent's position *vis a vis* the order of this Honourable Court.

30. **AD PARAGRAPH 36**

The deponent's interpretation of the order of this Honourable Court is with respect incorrect.

31. **AD PARAGRAPH 37**

I have explained the effect of Naidoo's statement above.

32. **AD PARAGRAPH 38**

This is not correct: the registration process was a necessary precursor but Naidoo was simply attempting to ensure that the deponent did not regard the registration of those not on the survey as an application for housing arising out of the order.

33. **AD PARAGRAPH 39**

This is not correct. The registration process was both necessary and important. It is not a sham and is not meant to fob the occupiers off. The

purpose of the registration process is described above. I must point out that the registration process is that designed for the expanded social package under development by the First Respondent.

34. **AD PARAGRAPH 40**

The City has identified alternative accommodation within the Inner City for those on the survey. The First Respondent acknowledges that people may wish to live in certain accommodation but must advise that this may not always be possible in the context of temporary accommodation.

35. **AD PARAGRAPH 41**

The contents of this paragraph are again extremely vague. The reality is that for a long time, there has been no real imperative on the occupiers to seek alternative accommodation. Nothing turns on this however.

36. **AD PARAGRAPH 42**

36.1 The obligation of the City is spelled out in the order of this Honourable Court of the 1st December 2011. To the extent that the Honourable Court saw fit to differ from the Honourable Supreme Court of Appeal in the wording of the order, the First Respondent is entitled to rely on this distinction;

36.2 Having now identified accommodation, the First Respondent can now provide the detail to the occupiers and their legal representatives.

37. **AD PARAGRAPHS 43 TO 48**

The contents of these paragraphs are noted. The contents of these paragraphs are however relevant to the second leg of the First Respondent's task arising from the order, being to develop a mechanism to deal with others who may find themselves in the same position. Given the short time period available to the First Respondent to comply with the order, it is not possible to comply with the provisions of the housing code

with respect to compliance with the order. This is particularly so because the First Respondent has only in the last day or two been able to confirm the temporary accommodation. I deny in the circumstances that the occupiers are entitled to require the process referred to in the Founding Affidavit. I also accordingly deny that the occupiers are entitled to the relief they seek in this regard.

38. **AD PARAGRAPH 50**

38.1 It is not correct that families will be torn apart. It has been the Applicants' practice throughout this litigation to extrapolate a few poignant examples into a general trend. This is neither appropriate nor correct.

38.1.1 Sipho Ndulini's daughter, Bongeka, is 27 years old;

38.1.2 Jumaima Radebe's daughter, Mlamuli Mthanti (listed as male in Annexure "H"), is also 27 years old;

38.1.3 Lindiwe Zuma's son, Wonderboy Shamase, is 20 years old;

38.1.4 Nkosinati Goge's brother, Mfano, is 25 years old.

39. **AD PARAGRAPH 51**

When one analyses the specific examples, it can be seen that they are not absurd at all. An obvious absurdity would be a minor child (as opposed to a 20 year old man) separated from its mother. The First Respondent would obviously not perpetrate such an act.

40. **AD URGENCY**

The First Respondent does not deny that the Applicants consider the application to be urgent. It contends however that the application should not have been brought at all as it is unnecessary. The First Respondent has certainly not misled or sought to mislead the Applicants and their legal representatives for the reasons given above.

41. **AD PARAGRAPH 53**

I have acknowledged in some detail above the inability of the First Respondent to move as fast as the Applicants would like. This is not due to fault on its part; it is the consequence of the enormous administrative burdens, not least regarding housing, which the First Respondent has to provide through its limited resources. It has always been the First Respondent's case that it would be unable to comply with the order of this Honourable Court without a significant re-prioritising of existing projects and this is what has had to take place. Until this week, it has not been possible to provide any details to the Applicants' legal advisers because to do so would have been speculative. Equally, it was not possible to engage with the Applicants and their legal advisers (other than the registration process), because the First Respondent's ability to comply with the order had not yet been confirmed beyond doubt. Every action on the part of the First Respondent in identifying occupation has a ripple effect elsewhere, which ripples have to be managed at a social and political level. It is necessary to consult with housing officials, officials from other organisations such as JOSHCO and of course the First Respondent's political structures.

WHEREFORE the First Respondent prays that the application be dismissed, with no order as to costs.

_____
DEPONENT

SIGNED AND SWORN TO BEFORE ME ON THIS _____ DAY OF _____ 2012, THE DEPONENT HAVING ACKNOWLEDGED AND HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT HE CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE**.**

_____
COMMISSIONER OF OATHS